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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-71863; File No. SR-ISE-2013-72)

April 3, 2014

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1, to More Specifically Address the Number and Size of Counterparties to a Qualified Contingent Cross Order

I. Introduction

On December 18, 2013, the International Securities Exchange, LLC (the “Exchange” or the “ISE”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change notice to amend Rules 504 (Series of Options Contracts Open for Trading) and 715 (Types of Orders) to more specifically address the number and size of counterparties to a Qualified Contingent Cross Order (“QCC Order”). The proposed rule change was published for comment in the Federal Register on January 7, 2014.³ On February 18, 2014, the Commission extended the time period for Commission action to April 7, 2014.⁴ The Commission received three comment letters on the proposal.⁵ On April 2, 2014, the Exchange

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 71208 (December 31, 2013), 79 FR 0881(January 7, 2014).

⁴ See Securities Exchange Act Release No. 71560 (February 18, 2014), 79 FR 10218 (February 24, 2014).

⁵ See letters to Elizabeth M. Murphy, Secretary, Commission, from Janet McGuiness, Executive Vice President, NYSE Euronext, dated March, 11, 2014 (“NYSE Letter”), Darren Story, CFA, dated March 14, 2014 (“Story Letter”), and Doug Patterson, CCO, CutlerGroup, LP, dated March 28, 2014 (“Cutler Letter”).

responded to the comment letters.⁶ Additionally, on April 2, 2014, the Exchange submitted an amendment to the proposed rule change.⁷ This order approves the proposed rule change, as modified by Amendment No. 1.

II. Background

As originally approved on ISE, a QCC Order was required to be comprised of an order to buy or sell at least 1,000 contracts that is identified as being part of a qualified contingent trade (“QCT”), coupled with a contra-side order to buy or sell an equal number of contracts.⁸

Following discussions regarding the QCC Order with Commission staff, the Exchange learned that Commission staff interpreted the Exchange’s rules relating to QCC Orders to permit only a single order on the originating side of the QCC Order and a single order on the contra-side, with each such order comprised of a single party and meeting the 1,000 contract minimum size requirement. In a Regulatory Information Circular published by the Exchange on November 25, 2013, the Exchange explained that it had always interpreted the QCC Order definition to mean that a QCC Order must be comprised of an unsolicited order to buy or sell at least 1,000 contracts that is identified as part of a QCT, coupled with a contra-side order that could be made up of multiple orders, each of which could be less than 1,000 contracts.⁹ ISE also stated that it would seek to amend its rules governing QCC Orders to codify its interpretation in its rules.¹⁰

⁶ See letter to Elizabeth M. Murphy, Secretary, Commission, from Michael J. Simon, Secretary and General Counsel, ISE, dated April 2, 2014 (“ISE Response”).

⁷ The Commission notes that Amendment No. 1 is not subject to notice and comment because it does not alter the substance of the proposed rule change or raise any novel regulatory issues, but rather describes how the Exchange surveils QCC Orders. See Section III below.

⁸ See Securities Exchange Act Release No. 63955 (February 24, 2011), 76 FR 11533 (March 2, 2011) (SR-ISE-2010-73) (“Original QCC Approval Order”).

⁹ See ISE Regulatory Information Circular 2013-022 (November 25, 2013).

¹⁰ Id.

On December 18, 2013, the Exchange filed two proposed rule changes with the Commission. In addition to this filing, the Exchange filed SR-ISE-2013-71, a proposed rule change for immediate effectiveness to amend the definition of a QCC Order such that it must involve a single order for at least 1,000 contracts on the originating side,¹¹ but may consist of multiple orders on the opposite, contra-side, so long as each contra-side order is for at least 1,000 contracts.¹² In that filing, the Exchange explained,

It was always the Exchange's intent and understanding when drafting the rule text that a QCC Order could involve multiple contra-parties of the QCC trade when the originating QCC Order consisted of at least 1,000 contracts. However, the rule language addressing the contra-side of a QCC Order is drafted from the perspective of how the QCC Order gets entered into the ISE system. Specifically, the contra-side order to a QCC Order will always be entered as a single order, even if that order consists of multiple contra-parties who are allocated their portion of the trade in a post-trade allocation. Notwithstanding the foregoing, the literal wording of the current QCC Order rule could result in a more limited interpretation of the rule. Therefore, the Exchange now proposes to make it clear that a QCC Order must involve a single order for at least 1,000 contracts on the originating side, but that it may consist of multiple orders on the opposite, contra-side, so long as each of the contra-side orders is for at least 1,000 contracts.¹³

III. Description of the Proposed Rule Change

In this filing, the Exchange proposes to remove the requirement that contra-side orders of QCC Orders be for at least 1,000 contracts each, thus permitting multiple contra-side orders on a QCC Order with a total number of contracts equaling the originating order size, but without any size requirement for such contra-side orders. Under this proposal, the requirements for the QCC Order's originating order remain unchanged, and thus would require the originating order to be a

¹¹ In the case of Mini Options, the minimum size is 10,000 contracts.

¹² See Securities Exchange Act Release No. 71183 (December 24, 2013), 78 FR 79721 (December 31, 2013) (SR-ISE-2013-71).

¹³ Id. at 79722.

single order for a single party of at least 1,000 contracts, and the QCC Order must also continue to satisfy all other requirements of a QCC Order under the Exchange's rules.

The Exchange believes that removing the size limit placed on contra-parties to QCC Orders may increase liquidity and, potentially, improve the prices at which QCC Orders get executed, as the Exchange states that the ability for market participants to provide liquidity in response to large sized orders is directly proportional to the size and associated risk of the resulting position. As support, the Exchange states that smaller sized trades are often done at a better price than larger sized trades, which convey more risk. The Exchange believes that the ability to pool together multiple market participants to participate on the contra-side of a trade for any size, as opposed to only allowing market participants to participate for a minimum of 1,000 contracts, would have a direct and positive impact on the ability of those market participants to provide the best price as they compete to participate in the order without being compelled to provide liquidity with a large minimum quantity. Further, the Exchange states that allowing several participants to offer liquidity to a QCC Order serves to ensure that the order receives the best possible price available in the market and argues that restricting interaction to only participants who are willing to trade a minimum of 1,000 contracts simply guarantees an inferior price because a trade will be limited to few liquidity providers who are taking on more risk as opposed to multiple liquidity providers being able to share the overall risk and trade at a better price.

In the proposal, the Exchange stresses that the concern has always been and should continue to be for the originating order—i.e., the unsolicited part of the order that is seeking liquidity—and not the professional responders and providers of liquidity. The Exchange believes that allowing smaller orders to participate on the other side (i.e., contra-side) of QCC Orders not

only provides the best price and opportunity for a trade to occur in a tight and liquid market, but ensures that the highest possible number of liquidity providers are able to participate, and states that limiting participation only to liquidity providers who are willing to participate on the trade for 1,000 contracts conversely could result in an inferior price by shutting out some participants due to the large size and thereby minimizing the opportunity for competition and price improvement.

In Amendment No. 1, the Exchange represents that it tracks and monitors QCC Orders to determine which is the originating/agency side of the order and which is the contra-side(s) of the order to ensure that Members are complying with the minimum 1,000 contract size limitation on the originating/agency side of the QCC Order. The Exchange states that it checks to see if Members are aggregating multiple orders to meet the 1,000 contract minimum on the originating/agency side of the trade in violation of the requirements of the rule. The rule requires that the originating/agency side of the trade consist of one party who is submitting a QCC Order for at least 1,000 contracts. The Exchange represents that it enforces compliance with this portion of the rule by checking to see if a Member breaks up the originating/agency side of the order in a post trade allocation to different clearing firms, allocating less than 1,000 contracts to a party or multiple parties. For example, a Member enters a QCC Order into the system for 1,500 contracts and receives an execution. Subsequent to the execution, the Member allocates the originating/agency side of the order to two different clearing firms on a post trade allocation basis, thereby allocating 500 contracts to one clearing firm and 1,000 contracts to another clearing firm. The Exchange states that this type of transaction would not meet the requirements of a QCC Order under the current rule.

With regard to order entry, the Exchange clarifies that a Member must mark the originating/agency side as the first order in the system and the contra-side(s) as the second. The Exchange states that it monitors order entries to ensure that Members are properly entering QCC Orders into the system.

IV. Summary of Comment Letters and ISE's Response to Comments

The Commission received three comment letters opposing the proposed rule change.¹⁴ As described in more detail below, the commenters primarily expressed concerns about QCC Orders generally, as opposed to the rule modifications proposed by the Exchange.

In the NYSE Letter, the commenter does not raise new concerns, but rather concurs with the issues expressed in a comment letter submitted by the Chicago Board Options Exchange ("CBOE") in response to a separate filing by another exchange—SR-Phlx-2013-106—which proposed to permit multiple contra-side parties on either side of a QCC Order and eliminate the minimum size requirement, but which was subsequently withdrawn. The commenter asserts that CBOE's comments are applicable to the instant proposal.¹⁵ Specifically, this commenter echoes CBOE's belief that QCC trades, by their nature, harm options markets by enabling market participants to effect listed options transactions without exposing their order to the market – hampering liquidity by reduced transparency and eliminating the possibility of price improvement.¹⁶ In addition, the commenter concurs with CBOE's conclusion that an expansion

¹⁴ See supra note 5.

¹⁵ See letter to Elizabeth M. Murphy, Secretary, Commission, from Angelo Evangelou, Associate General Counsel, Chicago Board Options Exchange, Incorporated, dated December 13, 2013 ("CBOE Letter"). SR-Phlx-2013-106 was withdrawn on February 3, 2014. CBOE did not submit a comment letter on this filing.

¹⁶ See NYSE Letter at 1; see also CBOE Letter at 2-3.

of the use of the QCC Order by reducing the minimum size required to participate in a QCC trade would exacerbate the harm to the options markets resulting from QCC trades.¹⁷

Another commenter to the instant filing claims that market participants use QCC Orders to disadvantage customers and avoid due diligence obligations.¹⁸ In support of this contention, the commenter notes that QCC Orders allow market participants to execute the stock portion of a stock/option order outside the NBBO, resulting in inferior net execution prices for customers.¹⁹ The commenter states that such use of QCC Orders allows orders to be effected which do not need to adhere to best-executions on a net cash basis to the detriment of customers, and argues that requiring exposure of orders would curtail this abuse.²⁰

This commenter also argues that the fee structure in place for QCC Orders creates a conflict of interest among market participants in that a rebate is paid to executing brokers that initiate a QCC Order while a fee is charged to the counter-parties.²¹ The commenter believes that the incentive to obtain the rebate offered for QCC Orders can cause brokers to ignore their responsibility to obtain the best price on a trade and mitigate unnecessary fees whenever possible.²²

The third commenter requested that the Commission disapprove the proposal, stating that the filing defies the general principles that all orders be exposed to as many sources of liquidity as possible.²³ The commenter believes that without exposure there is no incentive for market

¹⁷ See NYSE Letter at 1; see also CBOE Letter at 3.

¹⁸ See Story Letter at 1.

¹⁹ See Story Letter at 1-2.

²⁰ See id.

²¹ See Story Letter at 3.

²² See id.

²³ See Cutler Letter at 1.

makers to display liquidity, provide liquidity, or offer price improvement, resulting in the general public failing to receive the best possible price on any order.²⁴

In response to the comment letters, ISE states that it does not believe that the commenters raise any issues related to removing the contra-party size restriction for QCC Orders as proposed.²⁵ Further, ISE notes that the issues raised by the commenters were well vetted by the Commission prior to the Original QCC Approval Order and therefore does not believe that the commenters raise new issues relevant to the current proposal.²⁶

V. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁷ Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁸ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

In its original approval of the QCC Order for ISE, the Commission noted the benefits of contingent trades to investors and the market as a whole.²⁹ Specifically, in providing for an

²⁴ See id.

²⁵ See ISE Response at 1.

²⁶ Id.

²⁷ In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C

²⁸ 15 U.S.C. 78f(b)(5).

²⁹ See Original QCC Approval Order, supra note 8, at 11540-11541.

exemption from certain requirements of Regulation NMS for QCTs, the Commission recognized that contingent trades can be “useful trading tools for investors and other market participants, particularly those who trade the securities of issuers involved in mergers, different classes of shares of the same issuer, convertible securities, and equity derivatives such as options” [italics added].³⁰ In the Original QCC Approval Order, the Commission also reiterated the finding from its Original QCT Exemption that those transactions that meet the specified requirements of the QCT exemption could be of benefit to the market as a whole and a contribution to the efficient functioning of the securities markets and the price discovery process.³¹

In analyzing ISE’s original QCC Order, the Commission weighed the benefits of QCTs, of which QCC Orders are a subset, against the benefits provided by the general requirement for exposure of orders in the options markets.³² In the Original QCC Approval Order, the Commission stated that the QCC Order strikes an appropriate balance for the options market in that it is narrowly drawn and establishes a limited exception to the general principle of exposure and retains the general principle of customer priority in the options markets because QCC Orders are required to be: (1) part of a QCT under Regulation NMS; (2) for at least 1,000 contracts; (3) executed at a price at or between the national best bid or offer; and (4) cancelled if there is a Priority Customer Order on ISE’s limit order book at the same price.³³ The Commission specifically noted that a QCC Order must not only be part of a QCT by satisfying each of the six underlying requirements of the NMS QCT Exemption, but must be for a minimum size of 1,000 contracts, and that these requirements provide another limit to its use by ensuring only

³⁰ See Securities Exchange Act Release No. 54389 (August 31, 2006, 71 FR 52829, 52830 (September 7, 2006)) (“Original QCT Exemption”).

³¹ See Original QCC Approval Order, supra note 8 at text accompanying footnote 115.

³² Id. at 11541.

transactions of significant size may avail themselves of this order type.³⁴ Given the requirements for QCC Orders, the Commission also noted its belief that those customers participating in QCC Orders would likely be sophisticated investors who should understand that their order would not be exposed for potential price improvement, and that these customers should be able to themselves assess whether the net prices they are receiving for their QCC Order are competitive.³⁵ The Commission also specifically noted that broker-dealers are subject to a duty of best execution for their customers' orders, and that duty does not change for QCC Orders.³⁶

In considering ISE's proposal to eliminate the minimum size requirement for the contra-side of QCC Orders, the Commission has again weighed whether the benefits of this order type, as proposed to be modified, to investors and the market outweigh the benefits provided by the general requirement for exposure of orders in the options markets. The Commission notes that ISE's proposal does not change the requirements that a QCC Order must be: (1) part of a QCT under Regulation NMS; (2) executed at a price at or between the national best bid or offer; and (3) cancelled if there is a Priority Customer Order on ISE's limit order book. In addition, the changes to QCC Orders under SR-ISE-2013-71³⁷ permit multiple contra-side orders for QCC Orders, so long as each such contra-side order is for at least 1,000 contracts. In this filing, the only requirement that ISE proposes to change is to eliminate the requirement that contra-side orders of a QCC Order be for at least 1,000 contracts.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ See supra note 12.

The Commission believes that this change to the minimum size requirement for the contra-side(s) of QCC Orders is narrowly tailored and, significantly, the Exchange's rule text clearly requires that the originating side of a QCC Order must be comprised of a single order (i.e., a single party) for at least 1,000 contracts. The Commission believes that retention of the requirements that the original side be comprised of a single order from a single party and that such single order be for at least 1,000 contracts will continue to ensure that sophisticated investors, who are aware that their orders will not be exposed for price improvement, and who themselves should be able to assess whether the net prices for their QCC Orders are competitive, will initiate QCC Orders in an effort to effectuate a complex transaction that complies with all the requirements of the QCC Order.

The proposed rule change will allow multiple contra-parties with order sizes of less than 1,000 to aggregate their interest to pair against the originating side of a QCC Order to facilitate the execution of the QCC Order. The Commission believes that allowing smaller orders from multiple parties to participate on the contra-side of QCC Orders may provide a better opportunity for QCC Orders to be executed and, potentially, at better prices. The Commission acknowledges that limiting participation on the contra-side of a QCC Order only to liquidity providers who are willing to participate on the trade for 1,000 contracts, could result in less interest in the trade than if contra-side orders were not required to meet the 1,000 contract minimum, potentially diminishing the opportunity for competition and price improvement. The Commission believes that the proposed modification to the definition of QCC Order is narrowly drawn in that it does not impact the fundamental aspects of this order type, and merely permits QCC Orders to include multiple contra-parties, regardless of size on the contra-side, while preserving the 1,000 contract

minimum on the originating side of a QCC Order. Accordingly, the Commission finds the proposed rule consistent with the Act.

The issues raised in the comment letters do not specifically address the changes proposed in the instant filing, and the Commission agrees with ISE that the commenters on the proposed rule change do not present any arguments that were not considered fully in Original QCC Approving Order (i.e., QCC Orders harm the market by not requiring exposure), or are outside the scope of this proposal (i.e., fee rebates for initiating QCC Orders create a conflict of interest for brokers).³⁸

The Commission notes that, given the differing requirements as between the originating side and contra-side for QCC Orders, it is essential that the Exchange be able to clearly identify and monitor—throughout the life of a QCC Order, beginning at time of order entry on the Exchange through the post-trade allocation process—each side of the QCC Order and ensure that the requirements of the order type are being satisfied including, importantly, those relating to the originating side. The Commission believes this to be critical so that the Exchange can ensure that market participants are not able to circumvent the requirements of the QCC Order (as amended by this proposed rule change), each of which the Commission continues to believe are critical to ensuring that the QCC Order is narrowly drawn.³⁹ Further, the Commission notes that,

³⁸ In addition, the Commission again emphasizes, as it did in the Original QCC Approval Order, that broker-dealers are subject to a duty of best execution for their customers' orders, and that duty does not change for QCC Orders. See supra note 36.

³⁹ The Commission expects the Exchange to have the capability to enable it to surveil that such requirements are being met. Though the Exchange has stated its ability to do so in Amendment No. 1, if the Exchange is not able to have such monitoring at any point in time, the Commission would expect the Exchange to take other steps to ensure that the QCC Order cannot be improperly used. For example, if the Exchange were not able to identify and monitor which side of a QCC Order is the originating order, the Commission would expect that it would require that both sides of the QCC Order meet the more

in Amendment No. 1, the Exchange has made certain representations regarding its enforcement and surveillance of its Members' use of QCC Orders, including, for example, not only at the time of order entry, but through the post-trade allocation process as well.

For the foregoing reasons, the Commission believes that the proposed rule change is consistent with the Act.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act⁴⁰ that the proposed rule change (SR-ISE-2013-72), as modified by Amendment No.1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴¹

Kevin M. O'Neill
Deputy Secretary

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stringent requirements of the originating side, i.e., that it be for a single order for at least 1,000 contracts.

⁴⁰ 15 U.S.C. 78s(b)(2).

⁴¹ 17 CFR 200.30-3(a)(12).